

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

In the Matter of )  
 )  
Redevelopment of Spectrum to )  
Encourage Innovation in the )  
Use of New Telecommunications )  
Technologies )

ET Docket No. 92-9

To: The Commission

**PETITIONERS' REPLY TO OPPOSITIONS AND COMMENTS**

The Public Safety Microwave Committee ("PSMC"), the Association of Public-Safety Communications Officials-International, Inc. ("APCO"), the County of Los Angeles, and the Forestry-Conservation Communications Association ("FCCA") (collectively referred to herein as "Petitioners"), by their attorneys, hereby submit the following Reply to pleadings filed in response to their Petition seeking reconsideration of the Commission's Memorandum Opinion and Order ("MO&O") in the above-captioned proceeding.

As demonstrated in our petition for reconsideration, the Commission's abrupt decision to require public safety agencies to vacate their 2 GHz microwave facilities will lead to the unnecessary and serious disruption of vital emergency communications operations. This complete reversal of policy at the last minute is contrary to express and unusually specific legislative intent, lacks an adequate basis in the record, and is blatantly inconsistent with the Commission's actions in the pioneer's preference proceeding.

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The Petition was opposed by American Mobile Satellite Corporation ("AMSC"), Cox Enterprises, Inc. ("Cox"), the Personal Communications Industry Association ("PCIA"), and UTAM, Inc. ("UTAM"). Notably, while these parties may be pleased with the Commission's last-minute unexpected repeal of the public safety exemption on its own motion, neither they nor any other prospective PCS provider had ever considered it necessary to request such action.

**I. THE OPPOSING PARTIES HAVE FAILED TO RECONCILE THE COMMISSION'S ACTION WITH EXPRESS CONGRESSIONAL INTENT TO THE CONTRARY.**

Cox attempts to rescue the Commission from its failure even to attempt to reconcile its decision with the Bumpers/Hollings Amendments of 1992 exempting public safety licensees from forced relocation by suggesting that the grant of a longer transition period, together with cost reimbursement for public safety users, will somehow satisfy Congressional concerns.<sup>1/</sup> This overlooks the key fact that the original bill offered by Senator Hollings (prior to the Bumpers Amendment) also included provisions requiring that new users of the 2 GHz band pay relocation expenses and provide new microwave facilities "at least as reliable" as those being replaced.<sup>2/</sup> The Senate concluded that those protections, which included an eight-year transition period, were insufficient for public safety licensees. Therefore, the Senate adopted unanimously Senator Bumpers' "perfecting"

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<sup>1/</sup> Opposition of Cox at 10.

<sup>2/</sup> 138 Cong. Rec. S10346 (July 27, 1992).

amendment to exclude State and local government licensees from any mandatory relocation.<sup>3/</sup> As Senator Bumpers explained, this "would respect the priority of public safety users of the spectrum, as provided by law."<sup>4/</sup>

Cox's remaining response on this point is to emphasize that the Bumpers/Hollings Amendment was never enacted into law. This completely ignores that the Amendment was far more than another bill dropped in the "hopper." The Amendment, after being approved by the full Senate without objection, was withdrawn in the Conference Committee only because the FCC adopted rules in the First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992), incorporating the essential provisions of the Amendment.

Perhaps to counter the impact of the Bumpers/Hollings Amendment, Cox argues that Congressional objectives in authorizing spectrum auctions would be better served if all 2 GHz incumbent microwave operations could be relocated. Cox Opposition at 11-12. In essence, Cox is suggesting that the Commission should take any step necessary to maximize revenues from spectrum auctions, even if that means evicting incumbent public safety licensees! Nothing could be further from long-standing Congressional intent and the basic

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<sup>3/</sup> Ironically, the five-year transition period that Cox touts as consistent with Congressional intent would actually provide less protection than the eight-year transition plan that the Senate rejected as insufficient for public safety users.

<sup>4/</sup> 138 Cong. Rec. S10350 (statement of Senator Bumpers).

provisions of the Communications Act that require the FCC to allocate spectrum in a manner that promotes the "safety of life and property." 47 U.S.C. § 151.

**II. THE OPPOSING PARTIES HAVE FAILED TO IDENTIFY RECORD EVIDENCE SUFFICIENT TO JUSTIFY THE COMMISSION'S ABRUPT CHANGE IN POLICY.**

Attempting to shore up the Commission's decision, Cox, PCIA, and AMSC point to the same few previously filed comments. However, this old record "evidence" is clearly insufficient to support the Commission's radical reversal of its prior decision to exempt public safety licensees from forced relocation.

Significantly, neither the Commission nor any other party had ever suggested before that this information compiled by Cox, APC and other parties justified a complete elimination of the public safety exemption. Rather, the information regarding incumbent licensees had been offered in support of either wider PCS bandwidths, shorter transition periods, or a narrower definition of exempt entities.

For example, Cox now points to its Comments filed on January 13, 1993, in response to the First Report and Order and Third Notice of Proposed Rulemaking. Those Comments included a Comsearch study of the degree to which the 2 GHz bands in San Diego are encumbered by "public safety"

microwave paths.<sup>5/</sup> However, neither then nor at any time prior to the MO&O did Cox or any other party argue that this information demanded repeal of the public safety exemption.

Indeed, after the San Diego study was submitted, the Commission adopted the Third Report and Order, reaffirming the need to exempt most public safety entities. Cox supported that decision, notwithstanding its study of the San Diego market, explaining that the Commission's "decision recognizes that microwave incumbents providing services that directly and predominately protect lives and property cannot risk any possibility of service disruption or inconvenience." Opposition of Cox Enterprises, Inc.

(November 8, 1993) at 6 (emphasis in original). According to Cox, the "balance struck by the Commission is equitable, necessary and will benefit ultimately both emerging technology service providers and microwave incumbents."

Id. at 7.

Several opposing parties also refer to APC's "Report on Spectrum Availability for Personal Communications Services Sharing the 1850-1990 MHz Band with Private Operational Fixed Microwave Service" (submitted to the Commission on November 20, 1992). However, they fail to note that the APC study analyzed all microwave paths together, with no attempt to distinguish between exempt and non-exempt licensees. APC

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<sup>5/</sup> The Comsearch analysis was completed prior to the Third Report and Order, in which the Commission narrowed the definition of exempt entities. Therefore, Comsearch may have overstated the impact of grandfathered "public safety" licensees in the San Diego market.

Report at 19. The point of the APC Report was to demonstrate that spectrum was available for immediate PCS implementation with the use of frequency-agile technology, rather than analyze the purported need to relocate all microwave licensees from the band. Indeed, APC has never asked the Commission to eliminate the public safety exemption.<sup>6/</sup>

If the evidence now cited by Cox had not previously prompted it or other prospective PCS providers to call for the repeal the public safety exemption (and they are the ones with the most to gain from such action), then how can such evidence now possibly justify the Commission's deciding on its own that its only alternative is to repeal the exemption? Certainly, the Commission must do more than simply cite the pre-existing record, which presumably it had carefully evaluated in reaching a radically different conclusion. Rather, an abrupt change of this magnitude must be supported by a reliable and detailed engineering and economic analysis of the complex technical considerations

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<sup>6/</sup> Several parties also cite a Statement by Comsearch submitted during the Commission's April 7, 1994, hearing in the PCS docket. Comsearch stated the advantages of larger spectrum blocks which "will allow for interference avoidance," Comsearch Statement at 2, and noted that in "order to achieve FCC-mandated coverage requirements, many microwave paths need to be relocated." Comsearch Statement at 5 (emphasis added). However, Comsearch did not state that all microwave licensees must relocate. Subsequently, the Commission modified the PCS channel plan to create more large spectrum blocks, further reducing the need to relocate microwave users. Memorandum Opinion and Order in Gen. Docket 90-314 at ¶¶ 41-62 (released June 13, 1994) ("PCS Order").

involved and the impact on public safety microwave incumbents -- an analysis which carefully balances these considerations against the disruption of relocation. The record is completely devoid of such information and technical analysis.

**III. OPPOSING PARTIES ARE AT A LOSS TO RECONCILE THE MO&O WITH THE PCS PIONEER'S PREFERENCE DECISION.**

As noted in the Petition, the most glaring inconsistency in the Commission's action is its statement that spectrum sharing "will not be possible," even though the Commission granted extraordinarily valuable pioneer's preferences to APC and Omnipoint for developing technologies to do just that.<sup>7/</sup> Not surprisingly, the opposing parties barely attempt to explain this inconsistency. The most they can muster is a footnote offered by Cox arguing that this is the wrong docket to challenge the validity of the pioneer's preferences.<sup>8/</sup>

Cox completely misses the point. Petitioners neither support nor oppose the pioneer's preference grants. Rather, Petitioners argue that the FCC, having made the pioneer's grants on the basis of APC's and Omnipoint's development of spectrum sharing technologies, cannot now simply turn its back and say that all public safety microwave facilities must be relocated because sharing "is not possible."

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<sup>7/</sup> See Petition for Reconsideration at 17-19.

<sup>8/</sup> Opposition of Cox at 13, n.22.

APC's only response to the Petition is a brief one-paragraph letter which appears to suggest that the value of its sharing technology is only to promote the immediate initiation of PCS.<sup>2/</sup> This interim consideration, however, was not the sole basis of the award of immensely valuable pioneer preferences to APC and Omnipoint. To the contrary, the Commission relied upon both interim and long-term considerations, finding that APC's technology would result in a "shared fixed and mobile services environment." Third Report and Order in Gen. Docket 90-314, FCC 93-550 (released February 3, 1994) at ¶35.

Nothing in the pioneer's preference decision or in this docket would suggest that the APC and Omnipoint technologies cannot permit long-term spectrum sharing. If the Commission now believes otherwise, it must do more than simply state a bare conclusion. It must dissect the sharing methodologies and explain in detail why they do not permit critical public safety microwave paths to remain on 2 GHz bands indefinitely.

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<sup>2/</sup> Letter from Jonathan D. Blake (June 29, 1994).



**IV. THE COMMISSION OVERSTATES AND PLACES UNDUE RELIANCE ON THE NEEDS OF UNLICENSED PCS PROVIDERS.**

The Commission appeared to place particular reliance in the MO&O on the impact of exempt microwave licensees on the ability of unlicensed PCS to develop, an argument supported by UTAM in its response to the Petition. However, since the MO&O, the Commission has reduced the spectrum allocation for unlicensed PCS from 40 MHz to just 20 MHz, limiting it to the portion of the 2 GHz band with the fewest incumbent microwave paths. PCS Order at ¶¶84-87. Thus, the unlicensed PCS problem so heavily relied upon in the MO&O has been reduced by more than half.

UTAM also cites information in various prior comments which support its newly alleged "fatal impact" of incumbent microwave paths on unlicensed PCS. This, if anything, raises more questions than it answers. If this old information showed that sharing was impossible, why didn't UTAM or any other unlicensed PCS supporter previously ask the FCC to force public safety microwave licensees to relocate? What new information or analytical data has caused UTAM to change its position. Similarly, for the Commission to step in on its own at the last minute, it must explain what new information and/or analytical data has caused it to reverse its prior decision to grandfather public safety licensees. At minimum, the Commission must analyze the degree to which unlicensed devices can be coordinated with microwave systems and whether there are

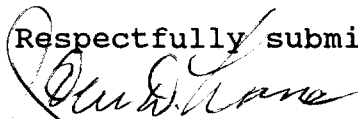
alternative frequency bands that may be more appropriate for nomadic devices.<sup>10/</sup>

Finally, even assuming that there is a valid basis for requiring relocation of all microwave facilities in at least some of the unlicensed portion of the band, that, at most, applies to the relatively few microwave licensees in the 1910-1930 MHz band. Nothing in that argument supports the need to relocate facilities in the 120 MHz of spectrum allocated for licensed PCS.

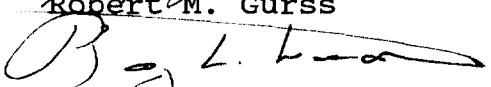
#### CONCLUSION

For the reasons stated above and in the Petition for Reconsideration, the Commission must reinstate the public safety exemption from forced relocation out of the 2 GHz microwave bands.

Respectfully submitted,

  
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<sup>10/</sup> The Commission noted in the recent PCS order that it was committed to find additional spectrum for unlicensed PCS devices, "including those potential unlicensed uses that may not be accommodated readily in the initial 20 MHz allocation." PCS Order at ¶87.

CERTIFICATE OF SERVICE

I, Mary Rebar, hereby certify that a copy of the foregoing "Petitioners' Reply to Oppositions and Comments" was served this 13th day of July, 1994, by first-class mail, postage-prepaid, to the following individuals at the addresses listed below:


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